IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 56 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

KIRANKUMAR RANCHHODBHAI & 3 - Applicant(s)

Versus

HIRABEN WD/O GANIBHAI (DELETEDAS PER ORDER BELOW EX.15) & 8 - Opponent(s)

==========

Appearance :

MR MB GANDHI for Applicant(s) : 1 - 4.
None for Opponent(s) : 1,
MR PS CHAMPANERI for Opponent(s) : 2 - 9.
RULE SERVED for Opponent(s) : 4.2.1, 4.2.2, 4.2.3, 4.2.4,4.2.5

==========

CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 25/11/2005

ORAL JUDGMENT

The petitioners-original plaintiffs- landlords are before this Court being aggrieved of the order passed by

the Small Causes Court No.3, Ahmedabad, below Exh.33, i.e. Misc. Civil application No.743 of 1996, which was allowed and the learned Judge was pleased to quash and set aside the decree passed in HRP Suit No.1866 of 1987 dated 18th October 1995 and restored the suit on file at its original number. The learned Judge directed that the suit be posted for evidence of the plaintiffs on 01.01.1998. He also directed the parties to remain present on 01.01.1998 before the Court. The learned Judge was pleased to award cost of Rs.200/- to the opponents. This Revision Application was filed on 02.02.1998 and on 03.02.1998 the Court issued notice returnable on 23.02.1998. On 09.03.1998 this Court passed the following order:

> "Rule. Let this matter be listed for final hearing on 20.03.1998."

2. However, the matter has reached final hearing only today, i.e. 25.11.2005.

3. Mr.Gandhi, the learned advocate vehemently argued that the learned Judge has committed an error in allowing the Misc. Civil application. He submitted that the

learned Judge has erred when he considered that Misc. Civil Application No.743 of 1996 was filed within time, taking into consideration the fact that the applicant of that application, the respondent herein, the original defendant in HRP Suit had learnt about the decree passed in HRP Suit only on 12.07.1996 and they filed Misc. Civil application No.743 of 1996 on 05.08.1996.

4. Mr.Gandhi, the learned advocate relied upon the decision of this Court in the matter of **Chunilal Nathubhai Vs. Abdul Razak Shaik and another**, reported in A.I.R. 1980 Gujarat 88. Mr.Gandhi particularly relied upon the following observations of this Court,

> ".. .. .. If, on account of non-service of summons or notice a defendant does not appear in the suit and an ex parte decree is passed against him, time begins to run against him for the purpose of making an application for setting aside the ex parte decree from the date on which he knew that an ex parte decree was passed against him. However, if the defendant is served with the summons and has appeared in the suit, then, it is his duty to attend the Court

> on all subsequent dates of hearing. If he does not appear on subsequent dates of hearing and allows an ex parte decree to be passed against him, it is not open to him to plead that the commencing point for the purpose of limitation is his knowledge and not the date of the decree. .. .. “ (emphasis supplied)

This Court is in full agreement with the proposition laid down by the aforesaid judgement. That being so, the Misc. Civil Application could not have been held to have been filed in time and there ought to have been an application for condonation of delay. As it is on record and as pointed out by the learned advocate Mr.Gandhi, in the present case, the defendants were served with the summons in HRP Suit and not only that a written statement was also filed. Mr.Gandhi further submitted that it is the case of the defendants themselves that they used to attend the Court and meet their advocate off and on, but then the learned advocate told the defendants that they need not come to the Court so frequently, they should rest assured, as and when the matter will be on Board and their presence is required they will be informed about the same. Mr.Gandhi submitted that in

view of that the matter is squarely covered by the aforesaid judgement and the application could not have been entertained treating the same to have been filed within the period of limitation. He submitted that therefore, this Civil Revision Application be allowed and order passed below in Misc. Civil Application No.743 of 1996 be quashed and set aside.

5. Mr.Y.V. Vaghela, the learned advocate appearing for the respondents submitted that in the event of quashing of this order it will cause grave injustice to the respondents-tenants. He submitted that it is a fact that the defendants were not at fault, it was only because they reposed faith in the learned advocate, they did not attend the matter, as required under the law. He invited attention of the Court to the facts are recorded in para 5 of the judgement and order. The relevant part reads as under:

> “.. .. It is deposed by Husenabibi that she has deposited the rent in the court in the suit only for three times and she has lastly deposited the amount on dtd. 11-10-1995. It is the fact that on the very next day the

> deposition of the plaintiff, i.e. on dtd.12.10.1995 was recorded and the judgement and decree were passed within a week form the deposition. .. ..”

The learned advocate submitted that there is no earthly reason for the tenants not to remain present if it was within their knowledge that the evidence of the plaintiffs is being recorded in the suit. He submitted that the fact that on 11.10.1995 the tenants have deposited the rent shows that they were vigilant about their right and continued to deposit the rent regularly. That being so, the defendant-tenants should not be made to suffer due to negligence on the part of the learned advocate.

6. In this regard the learned advocate relied upon two decisions of the Hon'ble the Apex Court. One in the matter of **Rafiq and another Vs. Munishilal and another**, reported in A.I.R. 1981 SC 1400. The learned advocate submitted that the Hon'ble the Apex Court has held that,

> “Where an appeal filed by the appellant was disposed of in absence of his counsel, so also

his application for recall of order of dismissal was rejected by the High Court, the Supreme Court in appeal set aside both the orders of dismissal on ground that **a party who, as per the present adversary legal system, has selected his advocate, briefed him and paid his fee can remain supremely confident that his lawyer will look after his interest and such a innocent party who has done everything in his power and expected of him, should not suffer for the inaction, deliberate omission or misdemeanour of his counsel.** .. ..” (emphasis supplied)

The second decision relied upon by the learned advocate is in the matter of **G.P. Srivastava Vs. R.K. Raizada and others**, reported in (2000) 3 SCC 54. According to the learned advocate the decision in this matter is also on the same lines as in the matter of **Rafiq & another** (supra).

7. It clearly transpires from the record that the original defendant-tenants were vigilant about their duty and they deposited the rent regularly. As the luck would have it they deposited the rent on 11.10.1995. The

Court is not able to assume or presume any reason for which a party will not attend the matter if it was within its knowledge. This is a case to which the observations of the Hon'ble the Apex Court that, 'the original defendant-tenants remained confident that their lawyer will look after their interest' are applicable. In such circumstances the original defendant-tenants cannot be allowed to suffer.

8. In view of the aforesaid, the order passed by the learned Judge, Small Causes Court, Ahmedabad dated 18.12.1997, treating the Misc. Civil Application to be within the period of limitation is quashed and set aside. However, the respondents herein-original defendants-tenants are granted liberty to file a fresh Misc. Application for restoration along with an application for condonation of delay setting out reasons for the same.

The learned Judge shall consider the application for condonation of delay and the Misc. application in light of the aforesaid discussion, in accordance with law. The respondents herein shall file necessary Misc. Application latest by 29th December 2005 so as to avail of the benefits of the aforesaid observations. The Civil

Revision Application is allowed. Rule is made absolute with no order as to costs.

(RAVI R. TRIPATHI, J.)

karim